

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

|                               |   |                       |
|-------------------------------|---|-----------------------|
| UNITED STATES OF AMERICA,     | ) | 3:13-cr-00029-HDM-VPC |
|                               | ) | 3:16-cv-00316-HDM     |
| Plaintiff,                    | ) |                       |
|                               | ) |                       |
| vs.                           | ) | ORDER                 |
|                               | ) |                       |
| NELSON JOVAN HERNANDEZ ANEDA, | ) |                       |
|                               | ) |                       |
| Defendant.                    | ) |                       |
|                               | ) |                       |

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On June 10, 2016, defendant filed a *pro se* motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. The court hereby conducts its preliminary review of the motion pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts, which provides:

The judge who receives [a § 2255] motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving part is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

1 A federal inmate may move to vacate, set aside, or correct his  
2 sentence under § 2255 if: (1) the sentence was imposed in violation  
3 of the Constitution or laws of the United States; (2) the court was  
4 without jurisdiction to impose the sentence; (3) the sentence was  
5 in excess of the maximum authorized by law; or (4) the sentence is  
6 otherwise subject to collateral attack. *Id.* § 2255. Defendant's  
7 motion is based on the Supreme Court's recent decision in *Johnson*  
8 *v. United States*, 135 S. Ct. 2551 (2015), which held that the  
9 residual clause of the Armed Career Criminal Act ("ACCA") is  
10 unconstitutionally vague.

11 Under the ACCA, certain persons forbidden by federal law from  
12 possessing, shipping or receiving firearms face increased penalties  
13 if they have three or more prior convictions for a "serious drug  
14 offense" or a "violent felony." The ACCA defines "violent felony"  
15 to include, among other things, an offense that "otherwise involves  
16 conduct that presents a serious potential risk of physical injury  
17 to another." 18 U.S.C. § 924(e)(2)(B)(ii). In *Johnson*, the  
18 Supreme Court held this part of the definition, referred to as the  
19 ACCA "residual clause," was unconstitutionally vague.

20 In his motion, defendant argues that his "prior state  
21 convictions do not qualify [for] ACCA Enhancement under 18 U.S.C.  
22 924 (e)." However, defendant was not sentenced pursuant to the  
23 ACCA. His crime in this case was unlawful reentry in violation of  
24 8 U.S.C. § 1326(a). Accordingly, whether any of defendant's prior  
25 convictions qualify as a violent felony under § 924(e) is  
26 irrelevant because he was not sentenced pursuant to that statute.


27 Defendant also argues that his sentencing range was increased  
28 for prior crimes of violence under U.S.S.G. § 2K2.1(A). Section

1 2K2.1 contains a definition of "crime of violence" that is  
2 effectively the same as the ACCA's definition of "violent felony" -  
3 including the residual clause. See § 2K2.1 adv. cmt. n.1; *id.* §  
4 4B1.2(a). However, defendant's sentencing range was not based on §  
5 2K2.1. Rather, for his unlawful reentry offense his range was  
6 established by § 2L1.2. Under § 2L1.2, defendant was subject to a  
7 16-level enhancement for a prior drug trafficking crime. While  
8 *Johnson* impacts some of the definitions under § 2L1.2, see *United*  
9 *States v. Hernandez-Lara*, 817 F.3d 651, 652-53 (9th Cir. 2016),  
10 *Johnson* has no effect on the definition of a drug trafficking  
11 crime. See *Jaramillo v. United States*, 2016 WL 3456849, at \*2  
12 (N.D. Ga. June 3, 2016) ("*Johnson* offers no relief - and indeed, is  
13 completely inapplicable - to prisoners like [Movant] who were  
14 exposed to higher sentences based on prior drug trafficking  
15 offenses, not crimes of violence.").

16 *Johnson* provides no basis for granting defendant relief in  
17 this case. Accordingly, pursuant to Rule 4(b) of the Rules  
18 Governing Section 2255 Proceedings for the United States District  
19 Courts, defendant's § 2255 motion (ECF No. 36) is hereby **DISMISSED**  
20 and his motion for appointment of counsel is **DENIED**. The clerk  
21 shall serve a copy of this order on the defendant forthwith.

22 IT IS SO ORDERED.

23 DATED: This 12th day of July, 2016.

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25 UNITED STATES DISTRICT JUDGE  
26  
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